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IN THE

Supreme Court of the United States

October Term, 1968

(No. ~~1295~~)

ALLEGHANY CORPORATION, ET AL.,

Petitioners,

against

MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Empire Trust Company.

GRANVILLE WHITTLESEY, JR.
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BEN VINAR

April 21, 1969.

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Alleghany Corporation and Empire Trust Company, as Voting Trustee of Alleghany's Class B Missouri Pacific stock (hereinafter "petitioners") petition for a writ of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit entered in this case on March 7, 1969, in favor of respondent, Missouri Pacific Railroad Company (hereinafter MoPac).

Opinions Below

The opinion of the Court of Appeals is not reported and is printed in Appendix A *infra* beginning at p. 1a. The memorandum opinion of the District Court is reported at 279 F. Supp. 525 and is printed in Appendix B *infra* beginning at p. 11a.

Jurisdiction

The judgment of the Court of Appeals herein was entered on March 7, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

The decision of the Court of Appeals below in reversing the judgment of the District Court allowing counsel fees to petitioners as holders of a majority interest in the Class B shares of MoPac is an important sequel to earlier litigation in which this Court reversed the judgment of the same Court of Appeals in *Levin* v. *Mississippi River Fuel Corp.*, 386 U. S. 162.

This Court remanded for further proceedings consistent with its opinion. Among other matters, there followed applications for attorneys' fees by petitioners.

Petitioners present the following question:

Whether, in reversing the District Court's award of counsel fees for services in stockholder class actions properly brought by petitioners under Rule 23 of the Federal Rules of Civil Procedure both representatively on behalf of all Class B shareholders of MoPac and derivatively on behalf of MoPac, the Court of Appeals decided a federal question in a way in conflict with the applicable decisions of this Court in *Trustees* v. *Greenough*, 105 U. S. 527 (1881), *Sprague* v. *Ticonic Bank*, 307 U. S. 161 (1939) and *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714 (1967) in that the decision of the Court of Appeals was in disregard of the rule stated by this Court in those decisions that the power to award counsel fees is a part

of "'the general equity power 'to do equity in a particular situation ' '' 386 U. S. 714 at 719 when, on the facts of this case, every consideration of equity called for the allowance of counsel fees against MoPac in the extraordinary and exceptional case before the Court in which:

a. the efforts of petitioners at their own expense were successful in hard fought litigation before the District Court, the Court of Appeals and this Court in halting an unconscionable plan of consolidation proposed by the board of directors of MoPac elected by the dominant Class A shareholders;

b. the inherently unfair consolidation plan of MoPac, if carried through, would have appropriated 98 per cent of the tremendous equity of MoPac, belonging ratably to the 39,731 Class B shares, for the benefit of the 1,849,576 Class A shares and the action of the petitioners protected the Class B's interests and preserved that equity for the interests of its rightful owners under the MoPac charter; and

c. the litigation benefited MoPac as a matter of law in the definitive construction of its basic corporate charter as to the voting rights of all shareholders and by thwarting at its inception company action which would have been in violation of MoPac's charter and the relevant state law.

Statement of the Case

These applications for counsel fees are a sequel to the litigation before this Court in *Levin* v. *Mississippi River Fuel Corp.*, 386 U. S. 162. This Court there decided the ultimate issue of the voting rights of all shareholders of MoPac, and held that the Class B shareholders were entitled

under MoPac's charter to vote separately as a class on a proposed plan of consolidation which had been proposed by the MoPac board in disregard of the separate class voting provisions of the charter. The proposed plan would have expropriated some 98% of the value of the equity of the 39,731 Class B shares for the benefit of the 1,840,576 Class A shares, 57.95% of which were owned by defendant Mississippi River Fuel Corporation. The plan was aptly characterized by this Court as "like exchanging four rabbits for one horse". 386 U. S. at 169.

The decision of this Court resulted in a definitive construction of the MoPac charter.

Following the decision of this Court on February 27, 1967, the Interstate Commerce Commission, in April, 1967, at the request of MoPac dismissed the application for consolidation. Thereafter the District Court, after receipt of the mandate of this Court, on July 31st, ordered that the four cases be dismissed without prejudice except with respect to the voting rights issue previously adjudicated and reserved jurisdiction to determine what, if any, attorneys' fees and expense reimbursements should be allowed to plaintiffs or their attorneys against any of the defendants.

Attorneys claiming fees were directed to file verified claims therefor with supporting briefs and defendants were authorized to file briefs in opposition and provision was made for an evidentiary hearing. Applications for fees were filed by attorneys for petitioners herein and in the related cases and an evidentiary hearing was held.

The District Court concluded that this case came within the principle stated in *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939) because "the Court here is of the opinion that the instant case is an exceptional case and that in order to do justice, plaintiffs' attorneys should be

allowed a fee to be paid by MoPac", 279 F. Supp. at 529. It entered judgment, insofar as petitioners are concerned, for fees of $198,161.00 and expenses of $26,578.09 for services of counsel with primary responsibility in New York and for services of counsel in St. Louis. These amounts were the exact amounts for which application had been made and represented amounts theretofore charged and paid by petitioner Alleghany Corporation.* The present applications, if allowed, will be reimbursed to Alleghany Corporation.

On appeal to the Court of Appeals for the Eighth Circuit that Court reversed the judgment of the District Court and disallowed all attorneys fees and expenses for petitioners herein and in all related cases.

The Decision of the Court of Appeals

The Court of Appeals held that the decision in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714 was controlling and barred relief here because the exceptional kind of situation calling for an award of attorneys' fees for "dominating reasons of justice" was not met by "the facts before us".

This blunt fiat marks the beginning and the end of the court's review of the equities of the case. It also reveals

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* The District Court stated that the fees and expenses allowed would be refunded by counsel to petitioner Alleghany Corporation. The fact that payment has been made is surely irrelevant to the question of the right to an allowance though, as the District Court stated, it is relevant to the reasonableness of the amount of the allowance.

In the related cases, counsel rendered services on a wholly contingent basis dependent both on the successful outcome of the litigation and on the allowance of fees by the Court.

its total lack of appreciation of the need for allowances of fees in stockholder class actions made necessary by the acts of a corporation where important and successful efforts bring about not only protection and preservation of the interests of all stockholders represented in the litigation but also definitive benefits to the corporation.

The Court of Appeals took no account of the source of the power of federal courts to make allowances, stated in *Sprague* v. *Ticonic National Bank,* 307 U. S. 161 as "part of the original authority of the chancellor to do equity in a particular situation", *id.* at 166 and reaffirmed recently in *Fleischmann, supra,* 386 U. S. at 719.

The Court of Appeals also ignored its own decision in *Mercantile-Commerce Bank & Trust Co.* v. *Southeast Arkansas Levee District,* 106 F. 2d 966 (1939), in which it had applied the rule then recently stated by this Court in the *Ticonic* case, *supra.*

The Court of Appeals thus disregarded the equities of the case before it and the fairness of making allowances to do equity and justice in a class action under the extraordinary and exceptional situation before it.

Instead, the Court was unwilling to go beyond the point that all that was litigated was "the complex issue of voting rights" and that the B shareholders benefited from their success. There can be no doubt about the benefit to them. Indeed, that is a necessary and important part of success in all litigation of this sort. However, petitioners submit that that point marks the beginning of the inquiry, not the end of it. Benefit to a class of stockholders, despite the view of the Court of Appeals to the contrary, does not exclude benefit to the corporation in which they own stock.

The Reasons for Granting the Writ

Petitioners submit that review by this Court of the decision below is essential.

The Court of Appeals has again committed egregious error in the latest matter to come before it in this protracted litigation. Again we ask review and reversal by this Court.

We ask review this time because, in reversing the District Court's judgment allowing counsel fees and expenses to petitioners herein and in the related cases, the Court of Appeals has misapplied and rendered a decision in conflict with the decisions of this Court in *Trustees* v. *Greenough,* 105 U. S. 527 (1881), *Sprague* v. *Ticonic Bank,* 307 U. S. 161 (1939) and *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U. S. 714 (1967)..

It has done this by declining to recognize that the power of a federal court to make allowances of counsel fees and expenses is a part of its general equity power to do equity. While this power is to be exercised only in exceptional cases and for "dominating reasons of justice", the Court of Appeals did not review the record before it in the light of this test.

If the Court of Appeals' views were to prevail here, it would go far, as a practical matter, to protect such conduct as that of defendants MoPac and its controlling stockholder Mississippi River Fuel Corporation from action by stockholders to protect their interests and maintain the integrity of the corporate enterprise under the law. It ought not to be expected that such stockholders will bear the brunt of extensive and expensive litigation which benefited the entire class and the corporation. Yet in an action such as this—to prevent destructive corporate action rather than for damages—there is no calculable

"fund" generated by the litigation itself from which their counsel can be paid. If the corporation whose attempted illegal conduct prompted these actions is not to be held for attorneys' fees, it can hardly be expected that capable counsel will in the future undertake such demanding litigation.

In the review of the equities under this Court's test MoPac's conduct falls far short of its board's legal duty to all classes of its shareholders. Though elected by the dominant A shareholders, its duty extended to all its stockholders. It did not discharge this duty, and petitioners submit that it ill becomes MoPac now to deny its obligation to all in resisting payment of counsel fees and expenses to shareholders who were required to resort to litigation in order to protect their corporate interests from expropriation and to preserve the integrity of all interests in the enterprise.

A review of the equities also shows beyond dispute that petitioners had taken steps at their own expense in the District Court, the Court of Appeals and before this Court that were successful in halting the unconscionable plan of consolidation proposed by the board of directors of MoPac; that the plan would have expropriated the great bulk of the corporate equity of MoPac belonging to all Class B shareholders and transferred it to the A shareholders; that the litigation prevented this expropriation and preserved the fund for all shareholders of both classes for use under the provisions of the corporate charter; that the further benefit to MoPac as a matter of law was in the definitive construction of its corporate charter and settlement of the voting rights of all shareholders with respect to mergers and consolidations and other matters requiring class voting; and that the test of a benefit is not the ability to place a dollar value on it.

We further submit that a proper review of the decision of the District Court by the Court of Appeals would have shown that the District Court had, by its consideration of the equities, applied the correct test, that the amounts allowed by it were well within the bounds of its discretion as a court of equity, were not clearly erroneous and should have been affirmed, *Fiske* v. *Wallace,* 117 F. 2d 149, 152 (8th Cir.), *cert. den.,* 313 U. S. 589 (1941).

In seeking review by this Court, petitioners ask that the judgment of the Court of Appeals be reversed and that on remand it either be directed to apply the test stated in the *Ticonic* and *Fleischmann* decisions and review the allowances of fees and expenses made by the District Court under that test or, in the alternative, that this Court direct that, on remand, the judgment of the District Court be affirmed.

Petitioners urge the latter course. This litigation has been in progress for over five years since the filing of the complaints in late 1963 and early 1964 and, as this Court noted in its decision in *Levin* v. *Mississippi River Fuel Corp.,* 386 U. S. 162, 170, decided February 27, 1967, a particular point there under consideration was "so clear" that there was no need for remand to the Court of Appeals and "effective judicial administration" called for decision by this Court.

The only point now submitted by petitioners is that the Court of Appeals should have accepted and applied the correct test. This point is, we submit, "so clear" that there is no need to remand to the Court of Appeals for application of that test. The District Court, unlike the Court of Appeals, applied the correct test and, as stated in its memorandum, made the allowances of fees and expenses only after it had considered all relevant factors.

CONCLUSION

For the reasons stated petitioners pray that the writ be granted.

BRECK P. MCALLISTER,
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GRANVILLE WHITTLESEY, JR.
G. CARROLL STRIBLING,
BEN VINAR

April 21, 1969.

APPENDIX A

Opinion of United States Court of Appeals for the Eighth Circuit

Before VAN OOSTERHOUT, Chief Judge; MEHAFFY and HEANEY, Circuit Judges.

VAN OOSTERHOUT, Chief Judge.

This is an appeal by Missouri Pacific Railroad Company (Mo-Pac) from final judgment requiring Mo-Pac to pay attorneys' fees of plaintiffs' counsel aggregating $548,161.00 and $41,926.13 expenses incurred by such attorneys, all in connection with four companion suits identified in the caption hereto, brought by plaintiffs against Mo-Pac and others as a class action on behalf of named plaintiffs and all Class B stockholders of Mo-Pac for declaratory judgment.

The ultimate issue in controversy in the declaratory judgment action was whether Mo-Pac's Class A and Class B common stockholders were entitled to vote separately on a plan of consolidation entered into between Mo-Pac and Texas and Pacific Railway Company which was submitted to the Interstate Commerce Commission for order of approval pursuant to 49 U.S.C.A. § 5. Mo-Pac stated therein that under 49 U.S.C.A. § 5(11), the plan would be submitted to its Class A and Class B stockholders for a collective vote. Mo-Pac had previously announced that the Class B stockholders were not entitled to vote separately on the consolidation plan. At the time of the consolidation proceeding, Mo-Pac had outstanding 1,856,277 shares of Class A stock and 39,731 shares of Class B stock. Each Class A share is entitled to a noncumulative dividend not in excess of $5 per share and to $100 upon liquidation. Upon dissolution Class B is entitled to ratably share in all assets remaining after payment of amount due on the Class A stock. The Class B shares are entitled to such dividends as may be declared by the direc-

tors without restriction as to amount. Upon the basis of the net asset value shown by the books of Mo-Pac as of September 30, 1966, the equity of the Class A stock was $100 per share while that of Class B stock was $5280 per share. The provisions relating to the two classes of stock emerged as a result of the approval of the Mo-Pac reorganization under § 77 of the Bankruptcy Act. See *Mississippi River Fuel Corp.* v. *Slayton,* 8 Cir., 359 F.2d 106, 108.

Mississippi River Fuel owned over 50% of the Class A stock; Alleghany owned slightly over 50% of the Class B stock.

The nature and history of the declaratory judgment action is fully set out in the opinion of the District Court granting the declaratory relief prayed, (*Slayton* v. *Missouri Pacific R.R.,* 233 F.Supp. 747), our reversing opinion, (*Mississippi River Fuel Corp.* v. *Slayton,* 8 Cir., 359 F.2d 106), and the opinion of the Supreme Court reversing our judgment and remanding the case to the District Court for further proceedings consistent with its opinion (*Levin* v. *Mississippi River Fuel Corp.,* 386 U.S. 162).

The voting rights issue presented by the declaratory judgment action was resolved by the Supreme Court as follows: "With reference to voting rights, we hold that in a consolidation as proposed here, Missouri law must be applied and that § 351.270 of that law requires the application of the Articles of Association of MoPac, which in turn, require the assent of the majority of the shareholders on a separate class-vote basis." 386 U.S. 162, 170.

In April 1967 the Interstate Commerce Commission at the request of the railroad applicants dismissed the application for consolidation. On June 30, 1967, after receipt of the Supreme Court mandate, the trial court entered an

order determining that the actions in these cases had been properly maintained as class actions and adjudging that the proposed plan of consolidation could not be approved or adopted by Mo-Pac without the consent of a majority of the shares of each class of stock. Thereafter, on July 31, after appropriate notice had been given to all Mo-Pac stockholders and an opportunity had been afforded to be heard, the court ordered that the four cases here involved be dismissed without prejudice, except with respect to the voting rights issue previously adjudicated, with the reservation of the jurisdiction to determine what if any attorneys' fees and expense disbursements should be allowed plaintiffs or their attorneys against any of the defendants. Attorneys claiming fees were directed to file verified claims therefor with supporting briefs and defendants were authorized to file briefs in resistance, and provision was made for an evidentiary hearing. Applications for attorneys fees were filed by attorneys for each of the plaintiffs, and an evidentiary hearing was held. The court allowed attorneys fees and expense reimbursement in the amounts previously indicated and entered judgment for such items. The basis for the judgment is set out in the court's memorandum opinion, *Slayton* v. *Missouri Pacific R.R.*, 279 F.Supp. 525.

The basic questions raised by the appeal attacking such judgment are:

(1) Under the facts of this case, did the District Court abuse its discretion or not in assessing attorneys' fees and expenses incurred in the declaratory judgment action against Mo-Pac?

(2) If not, are the amounts allowed reasonable, particularly in light of the alleged duplication of effort on the part of counsel for the various plaintiffs?

Appendix A

The trial court in its opinion based its allowance of fees and expenses on two findings, both of which Mo-Pac claim [sic] are erroneous. The first finding is to the effect that Mo-Pac benefited from the final determination of the voting rights issue by the Supreme Court. There is no value placed upon such benefit nor is such benefit weighed against the benefit derived by the Class B shareholders as a result of the litigation.

In a broad sense, it may be said that the final adjudication of any litigation in which a party has an interest is a benefit to him in that he then knows what his legal position is. As a result of the declaratory judgment, Mo-Pac was authoritatively advised that in a railroad consolidation proceedings [sic] such as the one it had instituted, separate majority consent must be obtained from its Class A stockholders and its Class B stockholders.

The parties primarily interested in the voting rights issue are the Class A and Class B stockholders. The interests of each in upholding their conflicting claims is substantial. Mo-Pac was required in connection with the submission of the consolidation plan to the Interstate Commerce Commission to make the initial determination on the voting rights issue. It seems entirely clear upon the record before us that the controversy in litigation over voting rights would develop which ever way Mo-Pac made the initial decision on the issue. Mr. Lowenthal conceded in his oral argument on behalf of the plaintiffs that if Mo-Pac had brought a declaratory judgment action to determine voting rights, there would have been appearances or interventions by the same parties, to wit, the A and B stockholders.

Forty-nine U.S.C.A. § 5(11) requires inter alia assent to a consolidation plan by the majority of the votes of the holders of stock entitled to vote "unless a different

vote is required under applicable State law, in which case the number so required shall assent.'' Thus, absent the declaratory judgment action, the responsibility for determining whether proper stockholder consent has been given is placed on the Commission in the first instance with review by the courts.

It is undisputed that the Class B stockholders obtained a very substantial benefit from the litigation they instituted and won. By obtaining the separate voting rights, they were able to defeat the consolidation plan which was disadvantageous to the Class B stockholders. The trial court found that the merger as proposed would have taken an equity value of $200,000,000 from B stockholders and given it to the A stockholders. We in our opinion and the Supreme Court in its opinion both pointed to the fact that the issue of the reasonableness of the plan was not before the court in the declaratory judgment action since the merits of the plan under the Act are the concern of the Commission in the first instance. Nevertheless, the record before us shows that the market value of a Class B share had dropped from a value of $1392 just prior to our decision to $530 just prior to the Supreme Court's granting of certiorari, and that after the decision of the Supreme Court on February 27, 1967, the market value rose to $1875 per share on March 10, 1967. All the plaintiffs named as litigants possessed substantial Class B stock interests. The Pomerantz affidavit in support of the fee claim alleges that based on salvaged market value Alleghany has been benefited in this action in the amount of $26,900,000.00; the intervening plaintiffs in Slayton have benefited in salvaged market value by $336,000.00 and the Harris, Stutch and Levin plaintiffs have been benefited through salvaged market value in the amount of $564,900.00. Based upon the Pomerantz figures for salvaged book value, the Alleghany Corporation has been benefited

$127,880,000.00, the Slayton intervening plaintiffs have been benefited $1,598,500.00 and the Harris, Stutch and Levin plaintiffs have been benefited $2,685,480.00.

There can under the record in this case be no doubt that the declaratory judgment actions were instituted primarily for the purpose of establishing separate voting rights and that the actions were instituted primarily for the purpose of obtaining such rights for the Class B stockholders. The benefits obtained for the Class B stockholders from the litigation far outweigh any indirect benefit Mo-Pac may have derived as a result of having the class voting rights adjudicated.

It would be difficult to place a monetary value on the worth to the corporation of the adjudication of the voting rights issue. No effort was made to do so. Mo-Pac was one of the parties defendant in the litigation and it appeared and defended. Nothing appears in the record that would indicate that anything in the way of diminution of litigation costs would be brought about by plaintiffs bringing the declaratory judgment litigation rather than having such litigation commenced by Mo-Pac or by having it resolved in the Interstate Commerce Commission proceedings. It would be reasonable to suppose that the Interstate Commerce Commission would reach the consent issue early in the proceedings. There is no evidence in the record as to what expense Mo-Pac incurred for its representation by counsel in plaintiffs' suits and it would be entirely speculative to say that the benefit Mo-Pac received from the litigation exceeds the expense it has incurred in connection with the litigation.

In the second finding upon which the decision is based, the court determined that the inherent unfairness of the plan is a sufficient reason to award attorneys' fees to the

plaintiffs. We find no merit to such ground. As we have previously observed, the fairness of the plan was not at issue or adjudicated in the declaratory judgment proceedings. The trial court recognized this to be true.

Some of the plaintiffs in their petitions alleged fraud and inequitable conduct upon the part of Mo-Pac and its directors and officers and some of the pleadings were aimed at obtaining derivative relief by reason thereof. Such issues were dismissed by the court with the consent of the plaintiffs and were never adjudicated. The trial court recognized this to be the fact in its refusal to award fees against the individual directors of Mo-Pac and against Mississippi River Fuel Corporation, holder of a majority of the Class A stock.

We observe that the issue of the right of the named plaintiffs and their attorneys to make a pro rata recovery of fees and expenses against Class B stockholders, who were members of the class on whose behalf the litigation was prosecuted and who benefited from the litigation, is not directly before us in this case. Relief here is sought only against Mo-Pac, certain directors and Mississippi River Fuel Corporation. It is elementary that a corporation is an entity separate and distinct from its stockholders and that earnings of a corporation remain the property of the corporation until severed and distributed as dividends and that a corporation cannot be required to pay obligations which are not its own but those of some of its stockholders. See *Hayes* v. *St. Louis Union Trust Co.*, Mo., 298 S.W. 91, 97; *Klein* v. *Board of Supervisors*, 282 U.S. 19, 24.

In our view, the recent case of *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, controls the issue here. While that case involved a rejection of attorneys' fees for the successful prosecution of a suit for deliberate infringement of a Lanham Act trademark, Chief

Appendix A

Justice Warren, in the opinion reviewing the underlying principles involved in allowing attorneys' fees to a successful litigant, points out that English courts have allowed attorneys' fees to successful litigants rather freely but that American courts have generally resisted such a movement in that direction. He then states, "The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." 386 U.S. 714, 717. Two reasons are stated in support of the rule, to wit, (1) litigation is at best uncertain and one should not be penalized for merely prosecuting or defending a lawsuit, and (2) the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration.

No statutory or contractual provision for attorneys' fees is present in the case before us. The reasons set out by the Chief Justice for not adopting the English practice fully apply to our present situation.

Our opinion on the voting rights issue demonstrated that we found the issue to be complex and difficult. There is nothing in the Supreme Court's reversing opinion to indicate that the issue lacks substance. The extensive time spent in briefing by plaintiffs' skilled and competent counsel reflects that they found the issue to be troublesome. The long record in support of the fee claim also supports the view that determination of fees puts a substantial burden upon judicial administration.

As the trial court observes, Fleischmann concedes that some exceptions have been made to the general rule. We note that the Court describes the exceptions as limited exceptions. None of the exceptions recognized in *Fleischmann* approaches our present situation.

Appendix A

Some of plaintiffs' briefs argue that the corporate assets constitute a fund. While Mo-Pac doubtless has funds in its possession, the corporate funds in our present situation have not been enhanced or increased by plaintiffs' action nor has plaintiffs' action in any substantial manner preserved funds that would otherwise be lost to the corporation. In such respect, the situation here differs from that in *Jesser* v. *Mayfair Hotel, Inc.*, Mo., 360 S.W. 2d 652. In *Jesser* the court among other things found: "[C]orporate shares had a value substantially in excess of either offer which excess would have been lost to the trust estate and ultimately to some or all of the certificate holders if the proposed sale had gone unchallenged." 360 S.W.2d 652, 661. Thus it would appear in *Jesser* assets of the estate were preserved which would have been lost in the absence of plaintiffs' action. Additionally the court in *Jesser* found that the Mayfair Hotel had agreed to reimburse the trustees for expenses incurred in operating the trust and that the litigation expense incurred was properly charged to the trust.

As we read *Fleischmann,* exceptions to the general rule are sparingly granted. The factual situation here does not fall within any exceptions recognized by *Fleischmann.* In *Sprague* v. *Ticonic Bank,* 307 U.S. 161, 167, the Court with respect to allowance of attorneys' fees in the absence of statutory or contractual provisions states: "[S]uch allowances are appropriate only in exceptional cases and for dominating reasons of justice." The facts before us do not meet such standard.

As heretofore pointed out, all that was actually litigated in the cases here involved was the complex issue of voting rights. The issue of fairness of the consolidation plan was clearly not decided in the litigation for which fees are here sought. The litigated voting rights issue was of

primary importance to both the Class A and the Class B stockholders. Any benefit flowing to the corporation as a result of the litigation was incidental and the inescapable result of the litigation. No new fund was created for the corporation nor were any assets of the corporation preserved.

The benefit to the Class B stockholders resulting from the legal victory were substantial. No unreasonable burden will be placed on the plaintiffs by their obligation to pay reasonable fees to counsel whom they employed. In fact, Alleghany has already paid or arranged to pay its attorneys for the work they have done.

It is our view that allowance of fees against the corporation would go well beyond the great weight of existing authority.

We hold that no reasonable basis exists on the record before us for the allowance against Mo-Pac of attorneys' fees and expenses incurred by the plaintiffs in the litigation here involved.

The judgment is reversed.

APPENDIX B

Opinion of United States District Court for the Eastern District of Missouri

MEMORANDUM

MEREDITH, District Judge.

The Court has received applications from counsel for plaintiffs for attorneys' fees and expenses incurred in connection with Slayton, et al., v. Missouri Pacific Railroad, et al., No. 63 C 436(2); Alleghany Corporation, et al., v. Mississippi River Fuel Corporation, et al., No. 64 C 48(2); Levin v. Mississippi River Fuel Corporation, et al., No. 64 C 77(2); and Harris, et al., v. Mississippi River Fuel Corporation, No. 64 C 340(2).

Plaintiffs Slayton, et al., were represented by the law firm of Pomerantz, Levy, Haudek and Block of New York, and Ackert and Tompkins of St. Louis. Plaintiff Alleghany Corporation (hereinafter referred to as "Alleghany") was represented by the firms of Donovan, Leisure, Newton, and Irvine of New York, and Fordyce, Mayne, Hartman, Renard and Stribling of St. Louis. Plaintiffs Levin and Harris were represented by John Lowenthal of New York, Maxwell Brandwen of Szold, Brandwen, Meyers and Altman of New York, Roberts Elam of St. Louis, and Alvin Levin of Sherin and Lodgen of Boston.

The suits giving rise to these applications were brought as class actions by plaintiffs as representatives of holders of Class B stock in the Missouri Pacific Railroad Company (hereinafter referred to as "MoPac").

In December 1963, the Board of Directors of MoPac approved a proposed plan of consolidation of MoPac and the Texas and Pacific Railway Company into a new corporation to be known as The Texas and Missouri Pacific Railroad Company. In its application to the Interstate Com-

merce Commission for authorization of the proposed consolidation, MoPac stated that the plan would be submitted to its stockholders for approval on the basis of a collective, rather than a class, vote. At this time there were two classes of MoPac stock totalling 1,896,008 shares. Of these 1,856,277 shares were Class A stock, having a limited annual return of $5.00 per share and a fixed value on liquidation of $100 per share, and 39,731 shares were Class B shares, whose holders were entitled to receive such dividends as the Board of Directors declared, without restriction as to amount, and to receive, on liquidation, all the assets of MoPac remaining after satisfaction of all the claims of Class A shareholders.

Over one-half of the Class A stock was owned by Mississippi River Fuel Corporation (hereinafter referred to as "Mississippi").

As of September 30, 1963, the consolidated net assets of MoPac were $394,721,242. The equity of the Class A stock was $100 per share, or $184,957,600, which constituted forty-seven percent of the total. The equity of the Class B stock was $5,280 per share, or $209,763,642, which constituted fifty-three percent of the total.

Under the proposed plan of consolidation, each share of MoPac stock, regardless of class, would have been exchanged for four shares $25.00 par value common stock of the consolidated company, thereby changing the relative participation in equity of the Class A and Class B shareholders from forty-seven percent and fifty-three percent, respectively, to ninety-eight percent and two percent, respectively, and destroying the Class B shareholders' constantly accruing percentage increase of the total equity by fixing their equity participation in the corporation enterprise permanently at two percent. (See Slayton v. Missouri Pac. R. Co., D.C., 233 F.Supp. 747.)

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Each plaintiff brought suit to compel class voting on the consolidation plan, thereby requiring a majority of each class to approve of it and asked for other relief. The parties agreed to limited consolidation on a motion to dismiss and the decision in the first instance went solely to the issue of voting rights of the classes of stock.

On July 13, 1964, this Court upheld the separate class voting rights of the MoPac shareholders under the corporation's charter and the applicable federal and state law, and denied defendants' motion to dismiss. 233 F.Supp. 747. Thereafter, defendants moved for certification for an interlocutory appeal under 28 U.S.C. § 1292(b). This Court granted the motion, and the Court of Appeals allowed the appeal. On April 19, 1966, the Court of Appeals reversed the District Court, holding that class voting was not required. Mississippi River Fuel Corp. v. Slayton, 8 Cir., 359 F.2d 106.

Plaintiffs petitioned the Supreme Court of the United States for writs of certiorari to review the judgment of the Court of Appeals, which writs were granted on October 10, 1966. Separate briefs and reply briefs were filed by plaintiffs Levin and Alleghany, and oral arguments were had before the Supreme Court on January 19, 1967.

The Supreme Court reversed the Court of Appeals, holding that class voting was required by MoPac's charter and applicable federal and Missouri law, and remanded to this Court for further proceedings consistent with the Supreme Court's opinion, Levin v. Mississippi River Fuel Corp. at 386 U.S. 162, 87 S.Ct. 927, 17 L.Ed.2d 834.

In March 1967, MoPac and The Texas and Pacific Railway abandoned the consolidation plan and withdrew it from consideration by the Interstate Commerce Commission. After various conferences had been held and proposals for terminating the litigation had been made, this

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Court entered a declaratory judgment on June 30, 1967, in all four actions, upholding class voting rights of MoPac shareholders. At the same time, the Court decreed that the suits were properly maintained as class actions, and set July 31, 1967, as the date for a hearing to determine whether to dismiss the actions without prejudice and with costs payable by defendants to plaintiffs, and reserving jurisdiction to entertain applications for plaintiffs' expenses and counsel fees. At that hearing, this Court disposed of all issues save those raised by plaintiffs' applications for expenses and counsel fees.

The law firms of Donovan, Leisure, Newton and Irvine, and Fordyce, Mayne, Hartman, Renard and Stribling, seek counsel fees and reimbursement of expenses only from MoPac. Pomerantz, Levy, Haudek and Block and their St. Louis counsel, Ackert and Tompkins, seek counsel fees and reimbursement of expenses primarily from MoPac, and secondarily from Mississippi, on the grounds that the latter is guilty of "inequitable conduct". Messrs. Lowenthal, Brandwen, Levin and Elam seek counsel fees and reimbursement of expenses from MoPac with a plea that Mississippi and defendant Directors of MoPac be required to participate in the liability therefor.

[1] Class and derivative suits are expressly permitted by Rule 23, Federal Rules of Civil Procedure, and the law is well settled that plaintiffs' successful prosecution of such class actions vests the Court with power to award counsel fees and expenses in appropriate circumstances. Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1882); Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939); Jesser v. Mayfair Hotel, Inc., 360 S.W.2d 652, 15 A.L.R.2d 389 (S.Ct.Mo.1962); German Evangelical St. Marcus Congregation v. Archambault, 404 S.W.2d 705 (S.Ct.Mo.1966); Mercantile-Com-

merce Bank & Trust Co. v. Southeast Arkansas Levee Dist., 106 F.2d 966 (8th Cir. 1939).

[2, 3] When a shareholder proceeds, at his own expense, to protect an interest common to other shareholders and of benefit to the corporation, he is entitled to reimbursement from the corporation which benefited from his efforts. When a plaintiff proceeds strictly for his own advantage, the litigation is "private litigation" and he must pay hs own counsel fees and expenses.

Defendants argue that plaintiffs' sole purpose in bringing suit was to enhance the value of their property, i. e., the Class B shares of stock, and that under these circumstances there is no lawful basis to assess counsel fees and expenses against MoPac, Mississippi or the Directors of MoPac. Plaintiffs argue that substantial benefits were conferred upon MoPac and all its shareholders because (1) there was a final adjudication of the voting rights of MoPac's two classes of stock in merger and consolidation, and (2) the consolidation plan, which would have been instituted by means of improper voting and which would have resulted in the corporation committing an *ultra vires* act detrimental to the corporation, was abandoned.

A judicial declaration of voting requirements for MoPac shareholders on merger and consolidation is a benefit to MoPac. In their Application for Permission to Take an Appeal from An Interlocutory Order, defendants stated that the question of voting requirements in mergers and consolidations is "a matter of great importance to both MoPac and to its stockholders" and Mississippi's briefs to the Court of Appeals stated that such a determination was important because it would apply to any plan of merger or consolidation.

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The fact that the merits of this particular plan and the question of class voting might have been determined by the Interstate Commerce Commission does not detract from the benefit accruing to MoPac from having the determination made, ultimately, by the Supreme Court of the United States.

The case of Jesser v. Mayfair Hotel, Inc., supra, indicates that the benefit conferred is of sufficient magnitude and importance to support an award of attorneys' fees. In *Jesser,* defendant hotel company's stock was placed in a voting trust pursuant to a reorganization decree. A majority of the voting trust certificates was held by defendants, a minority was held by a number of individuals, including plaintiffs. The voting trustees, as legal owners of the stock, proposed to sell the minority shares to a company associated with themselves, and plaintiffs succeeded in preventing the trustees from consummating the proposed sale by means of a successful class action for an injunction. The Supreme Court of Missouri found that

> "A trust beneficiary who prevents a wrongful disposition of trust assets renders a benefit to the trust estate as much as the one who recovers back property wrongfully disposed of."

and concluded that the preservation of the integrity of the voting scheme was a sufficient benefit to the voting trust to justify an award of counsel fees and expenses against defendant hotel company and the (voting) trust estate. The individual trustees were not, however, held personally liable for any part of these fees.

[4] While the case at bar does not involve a voting trust, the principles of the *Jesser* case are applicable to

the preservation of the voting scheme permitted by the corporate charter and the applicable state and federal laws. Based on such application, the Court finds that MoPac derived sufficient benefit from the declaratory judgment entered in this case to support charging attorneys' fees and expenses against it. [See also Berger v. Amana Society, 235 Iowa 378, 111 N.W.2d 753 (1962), and 257 Iowa 956, 135 N.W.2d 618 (1965), in which plaintiffs, as minority Class A shareholders, succeeded in invalidating a charter amendment which would have destroyed their redemption rights, for which action the Supreme Court of Iowa allowed counsel fees on the grounds that plaintiffs' success was a "corporate benefit" and, therefore, compensable by the corporation.]

The defendants in this case point out that there has been no judicial determination by this Court, the Court of Appeals, or the Supreme Court, that the plan in question was unfair or that any fraud has been committed by Mississippi, the Directors of MoPac, or anyone else. Defendants further point out that the benefit, if any, derived from this lawsuit was to the "B" stockholders and not the [sic] MoPac as a corporation. They also point out that there is no showing in the record that Mississippi had anything to do with the drafting, adoption or promulgation of the proposed plan or that any of the Directors of MoPac had any personal interest in this matter or that the Directors acted in any way, except in good faith. Among other cases cited by defendants is Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U. S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967). This case holds that attorneys' fees are not allowable in a Lanham Act case, 15 U.S.C. §§ 1051-1127, where the statute does not provide for attorneys' fees and also points out that attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.

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The *Fleischmann Distilling Corp.* case, supra, approves the principles set out in Sprague v. Ticonic Nat. Bank, supra. *Sprague* specifically holds at page 167 of 307 U.S., at page 780 of 59 S.Ct.:

> "And so, the circumstances under which the petitioner enforced the fiduciary obligation of the Ticonic Bank—the relation of its vindication to beneficiaries similarly situated but not actually before the court * * * and doubtless other considerations—must enter into the ultimate judgment of the District Court as to the fairness of making an award, * * *. In any event such allowances are appropriate only in exceptional cases and for dominating reasons of justice."

[5] The Court here is of the opinion that the instant case is an exceptional case and that in order to do justice, plaintiffs' attorneys should be allowed a fee to be paid by MoPac. While it is true the merits of the plan of consolidation have never been judicially passed on, it does not take any further inquiry than a reading of the balance sheet of MoPac, coupled with the plan, to determine its inherent unfairness to the B stockholders. The plan essentially would have taken from the B stockholders an equity in excess of $200,000,000 and given it to the A stockholders.

This is sufficient reason to award fees to the attorneys for the plaintiffs. This plan has now been abandoned. The voting rights and relative equities of A and B stockholders have been determined. The record before this Court is insufficient to make an award of fees against either the Directors of MoPac or Mississippi.

Having determined that plaintiffs' attorneys should be awarded attorneys' fees and expenses, and from whom these fees and expenses should be collected, the only issue

remaining is what fees are reasonable in the circumstances of this case?

[6] There is no dispute that in awarding counsel fees and expenses in actions of this sort, the courts have discretion to make reasonable awards. [See e. g., Murphy v. North American Light & Power Co., 33 F. Supp. 567 at 571 (S.D.N.Y.1940); Smolowe v. Delendo Corp., 136 F.2d 231 at 241, 148 A.L.R. 300 (2nd Cir. 1943), cert. den. 320 U.S. 751, 64 S.Ct. 56, 88 L.Ed. 446.] The factors to be included are:

> "the amount recovered for the corporation; the time fairly required to be spent on the case; the skill required and employed on the case with reference to the intricacy, novelty and complexity of issues; the difficulty encountered in unearthing the facts and the skill and resourcefulness of opposing counsel; the prevailing rate of compensation for those with the skill, experience and standing of the attorneys, accountants or others involved; the contingent nature of the fees, with the accompanying risk of wasting hours of work, overhead and expenses (for it is clearly established that compensation is awarded only in the event of success); and the benefits accruing to the public from suits such as this." Angoff v. Goldfine, 270 F.2d 185, at 189 (1st Cir. 1959).

The services rendered to Alleghany by Donovan, Leisure, Newton and Irvine, are outlined in detail in their verified application for a fee. The request by that firm is based on the number of hours which the firm's partners and associates devoted to this case. Time sheets indicate that partners spent a total of 1,893½ hours and associates spent a total of 1,239¼, or total time of 3,132¾ hours. Affidavits and testimony before the Court show that the

customary charge in New York for handling litigation of the importance and difficulty of this case is $75.00 per hour for partners' time and $35.00 per hour for associates' time. Thus, the total charge for partners' time is $142,012, and for associates' time is $43,374, which together total $185,386.

The expenses incurred by this firm in connection with this litigation are supported by vouchers and receipts in nearly every instance. These expenses total $25,838.56, a large portion of which is printing expense. These fees and expenses have either been partially paid or agreed to by Alleghany, the client, regardless of the outcome of this case and this, in the opinion of the Court, is the greatest test of all as to them being reasonable.

The services rendered to Alleghany by the law firm of Fordyce, Mayne, Hartman, Renard and Stribling in this litigation are set forth in detail. The requested fee is based on the 340 hours which partners of the firm devoted to this case, and the 35 hours which associates of the firm devoted to the case. In view of the fact that primary responsibility for the litigation rested with Donovan, Leisure, Newton and Irvine, applicant Fordyce, Mayne, Hartman, Renard and Stribling state that the reasonable value of its services is $35.00 per hour for partners' time and $25.00 per hour for associates' time, for a total of $12,775.00. In addition, this applicant seeks reimbursement for itemized expenses totalling $739.53. These fees have also been partially paid or agreed to by Alleghany, regardless of the outcome of this suit.

The Court finds that these fees and expenses are reasonable, and accordingly, an order will be entered allowing applicant Fordyce, Mayne, Hartman, Renard and Stribling the sum of $13,514.53.

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Whatever fees and expenses paid by Alleghany to its attorneys and recovered in this suit, will be refunded to Alleghany.

The services rendered to plaintiffs in this litigation by John Lowenthal, and the firms associated with him, were rendered on a fee basis wholly contingent both on plaintiffs' success and on the allowance of fees being awarded by this Court.

This set of plaintiffs' attorneys point out that defendants employed seven teams of attorneys to oppose these suits. These attorneys for defendants were:

(1) Bryan, Cave, McPheeters & McRoberts, St. Louis, Missouri

(2) Guilfoil, Caruthers, Symington & Montrey, St. Louis, Missouri

(3) Hendren & Andrae, Jefferson City, Missouri

(4) Mark M. Hennelly, Gilbert P. Strelinger and Robert Yost, St. Louis, Missouri

(5) Arnold & Porter, Washington, D. C.

(6) Sullivan & Cromwell, New York City

(7) Leon Leighton, New York City

The skill and resourcefulness of the attorneys for defendants are well known to this Court.

Lowenthal, et al., affirm that during the three and a half year period of the litigation, an aggregate of about 5,500 hours on approximately 475 separate days, including nights, Saturdays, Sundays, and holidays, was spent on the case, including 32 days in St. Louis or Washington. Applicants state that for services of this nature performed for a regular retainer client on a cash (non-contingent)

basis, they would have charged $375,000, but that for the same services rendered on a contingent-fee basis for clients not expected to become regular clients, the applicant attorneys would, if free to negotiate a fee with their clients, base rates not only on the amount of time spent, but also on the amount at stake, and the results achieved in the litigation. In the light of these facts, applicants Lowenthal, et al., submit that the reasonable value of their services in this litigation is greater than the $550,000 which they request as fees, plus the $12,504.85 as reimbursement for expenses incurred in the litigation.

The Court finds that the expenses of $12,504.85 are reasonable and will be allowed.

The firms of Pomerantz, Levy, Haudek and Block of New York, and Ackert and Tompkins of St. Louis, together, seek $750,000 in attorneys' fees, plus reimbursement for expenses of $2,799.26 and $43.98 for a total of $2,843.24. The expenses are outlined in a schedule of disbursements, and plaintiff Slayton's share of the cost of printing the petition for certiorari accounts for nearly one-half of this amount. All of the expenses are reasonable and will be allowed.

Applicants Pomerantz, et al., state that the proper criterion for assessing fees in class actions of this nature is benefits achieved. Measured in terms of benefits to the Class B stock, the increase in its market value which applicants attribute to the results of this litigation, totalled $53,800,000; the avoided decrease in its book value was $254,040,014, and the avoided annual earnings loss to the Class B shareholders, based on a price-earnings ratio of 11, (which is the average of all railroads throughout the nation in 1966) was $17,111,347.

Applicants also point out that where the client pays his lawyer, win or lose, he saves because he, not his lawyer,

assumes the risk of failure, but that in cases taken on a contingent-fee basis, the lawyer accepts the risk of failure and his success should be compensated accordingly.

Mr. Pomerantz' firm has specialized in this type of corporate litigation for thirty-three years, and has been described as "one of the country's foremost specialists in this type of litigation", Angoff v. Goldfine, supra, at 193. In his affidavit, Pomerantz states that in noncontingent cases of this type, his fee is $115 per hour, Mr. Haudek's fee is $75 per hour, and the time of the firm's associates is billed at $35 per hour. He estimates that a fair allocation of office overhead, secretarial, stenographic, clerical, and other employee activity attributable to this case during the period it was in the office amounted to about $40,000, which is covered by the fee he requests. Mr. Pomerantz and the lawyers associated with him, except for local counsel, kept no record of time spent.

They submitted, however, that in the present case, it would be unfair to assess fees on the basis of *quantum meruit,* because that was not the nature of the bargain. In support of this argument, Mr. Pomerantz points out that taking the increase in the market value of the Class B stock as a measure, the $750,000 fee requested represents less than two percent of the benefit accruing to the Class B shareholders.

In determining what overall fee plaintiffs' attorneys should be allowed in a case of this type, the Court must consider that this involved no trial, no discovery, but was limited to briefs and oral argument before the District Court, briefs and oral argument before the Court of Appeals, briefs and oral argument before the Supreme Court, in addition to the research necessary to prepare the briefs and make the oral argument. It proceeded essentially as one case from start to finish.

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It is to be noted that on behalf of plaintiffs, three separate briefs and reply briefs were filed with the District Court and the Court of Appeals; before the Supreme Court, Alleghany's attorneys and Slayton's attorneys joined in the briefs and Levin's attorneys filed separate briefs.

The oral argument before the Supreme Court was conducted by Alleghany's attorneys and Levin's attorneys.

The Court is of the opinion that $175,000 is a reasonable fee for Slayton's attorneys Pomerantz, Levy, Haudek and Block of New York and Ackert and Tompkins of St. Louis, and it will be allowed.

The Court is of the opinion that $175,000 is a reasonable fee for John Lowenthal, the firms of Szold, Brandwen, Meyers and Altman of New York, and Sherin and Lodgen of Boston, and Roberts Elam of St. Louis. This amount will be allowed.

[7] The total of all fees allowed plaintiffs' lawyers is $548,161.00 and the total of expenses is $41,926.18. Considering all the applicable facts and the law, these fees and expenses are reasonable. The division of these amounts among the three sets of lawyers is also reasonable. Judgment will be rendered in favor of the plaintiffs' lawyers and against MoPac for the foregoing amounts.

APPENDIX C

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ST. LOUIS, MO. 63101

ROBERT C. TUCKER, CLERK

Mar 7 1969

Messrs. Breck P. McAllister
and Granville Whittlesey, Jr.
Donovan Leisure Newton & Irvine
2 Wall Street
New York, New York 10005

Re: No. 19250-51-52-53. Missouri Pacific R.R. Co. v. Rose Slayton, et al.

Dear Sirs:

I enclose herewith, for use of counsel for the appellee, printed copy of the opinion of this Court prepared by Chief Judge Van Oosterhout filed today in the above cases. Judgment of this Court is also entered reversing the judgment of the District Court with costs and remanding the causes for proceedings not inconsistent with the opinion filed today.

Very truly yours,

Robert C. Tucker, Clerk

P
Enc.
cc letter & opinion to:

Mr. G. Carroll Stribling
Fordyce, Mayne, Hartman,
Renard & Stribling
506 Olive Street
St. Louis Missouri 63101